Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 332.

HENRY B. F. MACFARLAND ET AL., Commissioners of the District of Columbia,

vs.

EUGENE BYRNES ET AL.

Brief on Behalf of Appellants on the Motion of Appellees to Dismiss the Appeal.

Proceedings in this case were commenced under the provisions of an act of Congress approved March 3, 1899, providing for the extension of Eleventh street northwest, in the city of Washington, D. C.

Under that act of Congress the proceedings were instituted in the supreme court of the District of Columbia, holding a district court, and prosecuted according to the terms of said act of Congress, which referred for the method of procedure to chapter XI, Revised Statutes of the District of Columbia. A jury of seven was caused to be summoned by the marshal, which, pursuant to the act of March 3, 1899, rendered a verdict for damages caused by the taking of the land to be condemned, and, according to the terms of said act of Congress, levied assessments upon the abutting land to the extent of one-half of the

amount of damages awarded. After the verdict was rendered, the court passed an order *nisi* requiring all parties interested to show cause on or before a certain day why the verdict should not be confirmed by the court. Upon the hearing of the exceptions to the verdict and upon motion of the Commissioners of the District of Columbia to confirm the verdict, the trial court passed an order confirming the verdict as to the award for damages and setting it aside as to all assessments for benefits. From this judgment the Commissioners of the District of Columbia appealed to the Court of Appeals.

The Court of Appeals, upon authority of the case of Wight *et al. vs.* Davidson *et al.* (181 U. S., 371), reversed the trial court, holding the law to be constitutional and the assessments valid.

Following their decision rendered at the same term in the case of Brown *et al. vs.* Macfarland *et al.* (XXX Wash. Law Rep., 235), the Court of Appeals determined, although no parties to the case had asked for it, that they were entitled under the provisions of chapter XI, Revised Statutes of the District of Columbia, as matter of absolute right to a re-assessment by a second jury of twelve men, and therefore remanded the case in order that the owners of land could avail themselves of that right or forego it, as they might elect.

This court in construing a similar question in the case of Wheeling & Belmont Bridge Company *vs.* Wheeling Bridge Company (138 U. S., 287), said:

"If the judgment had been different all further proceedings would have been ended" (referring to the judgment of the supreme court of appeals of West Virginia).

In that case the courts of the State of West Virginia had determined the right of the bridge company to take the land condemned and appointed the commissioners to estimate the amount of compensation to be made. Considering

that state of facts, it is further said in the opinion of this court:

"Being for the condemnation, the estimate of the compensation, which was to follow, was to be made by commissioners, to be appointed, and might therefore be treated as being a distinct proceeding."

And, elsewhere in the opinion, that—

"The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment of condemnation was conclusive upon both particulars."

For these reasons this court reviewed the decision of the supreme court of appeals of West Virginia.

It is to determine this right of a trial by a second jury that the Commissioners of the District of Columbia have appealed to this court.

In their brief appellees have said that they could never appeal from the decree of the Court of Appeals. It is true that the amount or value of any award for damages to or assessments for benefits against any particular one of the appellees is not sufficient to give this court jurisdiction, but it plainly appears that the validity of statutes and of an authority exercised under the United States was drawn into question in the court below, and could have been presented by assignment of error on behalf of the appellees as well as on behalf of the appellants for the consideration of this court:

Parsons *vs.* D. C., 170 U. S., 45.

The principal and only question in the litigation for decision of this court, viz., the right of appellees to a trial by a second jury of twelve, has been determined by the Court of

Appeals. If that question be not reviewable by this appeal, then under the decision of the Court of Appeals every individual owner affected by the verdict of the jury may exercise that right independently, and no final decision, according to appellees' contention as to what is a final decision, can ever be reached.

The following decisions, distinguishing between cases in which appellate courts have decided against the sufficiency of a demurrer and where they have decided against the validity of a verdict, are precedents, establishing the jurisdiction of this court to review the judgment of the Court of Appeals in this case.

Humphries *vs.* D. C., 174 U. S., 190.
Phillips *vs.* Negley, 117 U. S., 665.
O'Dowd *vs.* Russell, 14 Wall., 402.

These cases, except the last, it will be noted, are cases from the courts of the District of Columbia.

It is respectfully submitted that the only question upon which this case could be brought before this court for review has been determined by the Court of Appeals, and that question is now properly before this court for review.

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